Supreme Court, U.S.
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No. 02-102

IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals of Texas Fourteenth District

BRIEF OF *AMICI CURIAE*, PRO FAMILY LAW CENTER, TRADITIONAL VALUES COALITION, TRADITIONAL VALUES EDUCATION & LEGAL INSTITUTE & JAMES HARTLINE, IN SUPPORT OF RESPONDENTS

RICHARD D. ACKERMAN *
GARY G. KREEP
UNITED STATES JUSTICE FOUNDATION
2029 East Valley Parkway, Suite 1-C
Escondido, California 92027
(760) 741-8086

* Counsel of Record

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF THE *AMICI CURIAE*	1
INTRODUCTION	2
I. PETITIONERS' EQUAL PROTECTION ARGUMENT IS FAULTY	9
II. HOMOSEXUALS ARE NOT A DISADVANTAGED CLASS FOR PURPOSES OF EQUAL PROTECTION ANALYSIS	12
III. REGULATING SAME-SEX AND OPPOSITE-SEX CONDUCT DIFFERENTLY IS PERMISSIBLE DUE TO GREATER PUBLIC HEALTH RISK OF SAME-SEX CONDUCT	17
IV. RECENT SOCIAL TRENDS ARE NOT A SUFFICIENT BASIS FOR OVERRULING *BOWERS v. HARDWICK*	23
V. PETITIONERS' DESIRE TO HAVE A CONDUCT-BASED STATUS RECOGNIZED AS A PROTECTED CONSTITUTIONAL STATUS DEFIES CONSTITUTIONAL COMMON SENSE	24
CONCLUSION	30

TABLE OF AUTHORITIES

CASES	Page
American Motorists Ins. Co. v. Starnes, 425 U.S. 637 (1976)	4
Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) (en banc), *cert. denied*, 478 U. S. 1035 (1986)..	14
Barbier v. Connolly, 113 U.S. 27, (1884)	9, 19
Ben-Shalom v. Marsh, 881 F.2d 454, 464-65 (7th Cir. 1989), *cert. denied*, 494 U. S. 1004 (1990)	14
Berman v. Parker, 348 U.S. 26 (1954)	24
Board of Education of Oklahoma City v. National Gay Task Force, 729 F.2d 1270, 1273, aff'd. 470 U.S. 903 (1985)	11
Bowers v. Hardwick, 478 U.S. 186 (1986)	*passim*
City of Renton v. Playtime Theaters, Inc., 475 U.S. 4, 106 S.Ct. 925 (1986)	23, 28
Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949)	24
Dronenburg v. Zech, 741 F.2d 1388, 1391 (D.C. Cir. 1984)	13
Frontiero v. Richardson, 411 U.S. 677, 686 (1973)	12, 14
Gay and Lesbian Students Ass'n v. Gohn, 656 F.Supp. 1045, 1057 (W.D. Ark. 1987)	13
Gay Inmates of Shelby County Jail v. Barksdale, No. 84-5666 (6th Cir. June 1, 1987)	13
Gladstone, Realtors v. Bellwood, 441 U.S. 91 (1979)	10
Goldblatt v. Hempstead, 369 U.S. 590 (1962)	24
Graham v. Richardson, 403 U.S. 365, 372 S.Ct. 1848 (1971)	13
High Tech Gays, 895 F.2d at 571-72 (9th Cir. 1990)	14, 17

TABLE OF AUTHORITIES—Continued

	Page
In re Opinion of the Justices, 129 N.H. 290, 295, 530 A.2d 21, 24 (1987)	13
Jantz v. Muci, 976 F.2d 623 at 624 (10th Cir. 1992), cert. den., 508 U.S. 952 (1993)	11
Japan Whaling Association v. American Cetacean Society, 478 U.S. 221 (1986)	30
Korematsu v. United States, 323 U.S. 214 (1944)	13-14
L'Hote v. New Orleans, 177 U.S. 587 (1900)	19
Lalli v. Lalli, 439 U.S. 259, 265 (1978)	14
Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911)	18-19
Loving v. Virginia, 388 U.S. 1, 11 (1967)	14
Mississippi University for Women v. Hogan, 458 U.S. 718, 723-724 (1982)	14
Moore v. East Cleveland, Ohio, 431 U.S. 494 (1977)	26
Morey v. Doud, 354 U.S. 457 (1957)	18
New York v. United States, 505 U.S. 144 (1992)	30
Northeastern Florida Chapter of Associated General Contractors of America v. Jacksonville, Florida, 508 U.S. 656 (1993)	4
Padula v. Webster, 822 F.2d 97, 103-04 (D.C. Cir. 1987)	14
Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973)	23
Phillips v. Marietta Corp. 400 U.S. 542. (1971)	17
Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946)	4
Reed v. Reed 404 U.S. 71 (1971)	17
Reno v. Flores, 507 U.S. 292 (1993)	27
Roe v. Wade, 410 U.S. 113, 164-165 (1973)	19

TABLE OF AUTHORITIES—Continued

	Page
Romer v Evans, 517 U.S. 620, 631 (1996)	10, 18
Rowland v. Mad River Local School District, 730 F.2d 444 (6th Cir. 1984), rehearing denied 470 U.S. 1009 (1985)	11
San Antonio School District v. Rodriguez, 411 U.S. 1, 28, 93 S.Ct. 1278 (1973)	12
Shaw v. Reno, 509 U.S. 630, 642 (1993)	9
Smith v. Robbins, 528 U.S. 259 (2000)	23
State v. Walsh, 713 S.W.2d 508, 511, 55 USLW 2070 (Mo. 1986)	13
Stenberg v Carhart, (99-830) affirming 192 F.3d 1142 (2000)	19
Sullivan v. U.I.L., 616 S.W.2d 170, 172 (Tex. 1981)	9
Thomasson v. Perry, 80 F.3d 915, 927-28 (4th Cir.), *cert. denied*, 117 S. Ct. 358 (1996)	14
Tileston v. Ullman, 318 U.S. 44 (1943)	10
United States v. Darby, 312 U.S. 100 (1941)	30
U.S. v Lopez, 514 U.S. 549 (1995)	24
CONSTITUTIONAL PROVISIONS	
United States Constitution—First Amendment	26
United States Constitution—Ninth Amendment	25
United States Constitution—Tenth Amendment	5, 26, 30
United States Constitution—Fourteenth Amendment	*passim*
LAW REVIEWS	
Seth Hilton, *Restraints on Homosexual Rights Legislation: Is There a Fundamental Right to Participate in the Political Process?* 28 U.C. DAVIS L. REV. 445, 453 (1995)	13

TABLE OF AUTHORITIES—Continued

	Page
Gary Alan Colis, *Romer v. Evans: Gay Americans Find Shelter After Stormy Legal Odyssey*, 24 PEPP. L. REV. 991, 995 (1997)	13
MISCELLANEOUS	
Ackerman, Richard D., *The State of America's Constitution*, The Western World, (Pearson Custom Publishing, Boston, MA 2002) pp. 80-85	25
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TABLE OF AUTHORITIES—Continued

	Page
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INTERNET SOURCES	
Center For Disease Control website, http://www.cdc.gov/hiv/stats.htm#exposure	19
Sodomy: A Public Health Risk, Family Policy Network, http://www.familypolicy.net/policy/sodomy-consequences.shtml	14
The Washington Times, http://dynamic.washtimes.com/twt-print.cfn?ArticleID=20030212	14

TABLE OF AUTHORITIES—Continued

	Page
http://www.adultgroupfinder.com/links/Gay_Male/more3.asp	4
http://www.bareback.com	4
http://barebacksexinsf.com/dark.htlm	4
http://hivinsite.ucsf.edu/InSite.jsp?doc=2098.418e	6
http://www.hivstopswithme.org/boston/troix/troix_email33.htlm	4
http://www.ironminds.com/impression/unprotected.shtml	4
http://www.lildragn.com/flameearchive/000044.html	4
http://www.poz.com/archive/February1000/inside/rideonthewild.htlm	4
http://www.virusmyth.net/aids/data/cfunprotected.htm	4
http://www.wired.com/news/culture/0,1284,18244,00.htlm	4

INTERESTS OF *AMICI CURIAE*

Amicus Curiae, Pro-Family Law Center (PFLC), is a division of Abiding Truth Ministries, a non-profit corporation organized under the laws of the state of California. PFLC is dedicated to protecting marriage and the natural family and opposing the legitimization of homosexuality and related conduct in American society. It has been active in formulating and analyzing public policy related to homosexuality and in public advocacy of family values since its founding in 1999. PFLC director, Scott Douglas Lively, is an attorney licensed to practice law in the State of California and an internationally recognized expert on the topic of homosexuality in society. On behalf of PFLC, Mr. Lively has served as an advisor and consultant to family values activists and organizations globally, and has addressed conferences on these issues in the United States, Canada, Great Britain and East Africa.

Both attorneys from the UNITED STATES JUSTICE FOUNDATION have served as legal experts to the State of California's Legislature (hearings on civil unions). Counsel of Record has served as an academic expert to the Marriage Law Project of the Catholic University of America on same-sex relations.

Amicus Curiae, TRADITIONAL VALUES COALITION is the largest non-denominational, non-profit grassroots lobby in America representing churches and individuals. TVC has been present at the U.S. Congress for over 20 years advocating for pro-family issues including the right to the free exercise of religious liberties. TVC represents over 43,000 churches bridging racial and socio-economic barriers and includes most Christian denominations.

Amicus Curiae, TRADITIONAL VALUES EDUCATION & LEGAL INSTITUTE is a non-profit foundation dedicated to educating and assisting churches and individuals in their efforts to restore America's Judeo-Christian cultural heritage

and their right to the free exercise of their faith. TVCELI makes information and analysis available on public policy and current cultural issues.

Amicus Curiae, JAMES HARTLINE is an ex-homosexual living in San Diego, California. He is forty-four years old and has been HIV positive for over five years. He made the choice to leave homosexuality several years ago. Mr. Hartline contracted HIV/AIDS through living the lifestyle advocated by Petitioners. Indeed, he engaged in private, consensual, adult, homosexual activities for about twenty years. His lifestyle activities included sodomy with other consenting males. Mr. Hartline has dedicated himself to educating others about the dangers of the homosexual lifestyle, and humbly offers this Honorable Court his experience with homosexuality, and HIV/AIDS, in an effort to prevent the deaths of countless other human beings. He offers others the opportunity to learn from his personal testimony as to the ability and community obligation to make responsible choices with one's body. Mr. Hartline describes the lifestyle promoted by Petitioners as 'operating on a moral compass with the needle broken off.'

INTRODUCTION

There is no constitutional right for an individual to engage in oral or anal sodomy with any other person. This type of conduct is not implicit to any concept of ordered liberty, such that a violation of substantive Due Process principles can be found. It is not irrational discrimination, if done for the right reasons, to criminalize same-sex sodomy while allowing opposite-sex sodomy to remain legal. Petitioners' sexual liberation theories cannot trump the legitimate, compassionate, and necessary right of the individual states to prevent death and disease.

Petitioners have painted themselves as uncontrollable sexual beings who must be given the freedom, at all social and physical costs, to be able to place their male reproductive organs in the anus of another human being. [Pet. Brief at pp.

8-9, 11-16; ACLU at pp. 8-9]. Health consequences are not an easily perceived concern of Petitioners, or their supporters, as privacy and fulfillment of Dionysian self-interest are the ultimate moral ends by which they live, and expect all others to live by. [Pet. Brief at pp. 11-16].

Petitioners' apparent position, and many of their supporting *amici curiae*, is that all private sexual conduct, between consenting adults is 'off limits' to the government. [Pet. Brief 13 ¶ 3; ACLU at pp. 4-25]. Petitioners paint with too broad a brush. To Petitioners, privacy is ostensibly more important than giving the states the right to stop, now, or in the future, the spread of deadly disease or the soaring healthcare costs of HIV/AIDS care. Regardless of what Petitioners say, the privacy of one's home should not be used as a permissible breeding ground for dangerous behaviors.

The most telling reality of the 'no-holds-barred' approach of Petitioners recently came to the forefront of national news. The following statement, relating to a member of the class of homosexuals sought to be given Fourteenth Amendment acknowledgment here, illuminates the reasonable fears of *Amici Curiae*:

> "Carlos is a part of an intricate underground world that has sprouted, driven almost completely by the Internet, in which men who want to be infected with HIV get together with those who are willing to infect them. The men who want the virus are called "bug chasers," and the men who freely give the virus to them are called "gift givers." [. . .] *HIV-infected semen is treated like liquid gold.* [. . .] [B]ug chasers will do anything to get the virus—to "get knocked up," to be "bred" or initiated into the brotherhood. [emphasis added]." Gregory A. Freeman, Bug Chasers: The Men Who Long to Be HIV+, *Rolling Stone* (February 6, 2003 at 44).

It must be recognized that the individual States have a right to extend compassion and responsibility toward the causes

and conduct associated with phenomena of the type described in Carlos' life. Carlos' behavioral choices, or those *potential* choices of Petitioners[1], and the social consequences resulting therefrom, are apparently not unique. See,

http://www.lildragn.com/flamearchive/000044.html;
http://www.wired.com/news/culture/0,1284,18244,00.html;
http://barebacksexinsf.com/dark.html;
http://www.adultgroupfinder.com/links/Gay_Male/more3.asp;
http://www.virusmyth.net/aids/data/cfunprotected.htm;
http://www.ironminds.com/impression/unprotected.shtml;
http://www.hivstopswithme.org/boston/troix/troix_email33.html;
http://www.poz.com/archive/february1999/inside/rideonthewild.html.

In fact, members of Petitioners' class of persons, in the State of Texas, offer the following:

> "No lectures, spamming, or saints trying to tell us what we're doing. We just want to meet and ram each other. If that's not what you want, this list isn't for you. No discussion of HIV issues. Take that up privately if you need to. http://www. adultgroupfinder.com/links/Gay_Male/more3.asp

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[1] The record does not indicate, one way or the other, whether Petitioners engage in what might be characterized by them as 'safe' sodomy. Without a sufficient record, one can only assume that Petitioners are arguing for a constitutionally-recognized right to engage in 'safe' and 'unsafe' sodomy, without State interference. The Texas statute is presumed valid, especially where speculation is apparent in the record. *See Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946)[showing of law's applicability or nonapplicability must be made]; *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637 (1976) [discriminatory statute may be non-discriminatory in its actual operation]. A party must demonstrate actual injury for standing to apply. *Northeastern Florida Chapter of Associated General Contractors of America v. Jacksonville, Florida*, 508 U.S. 656 (1993). Here, Petitioners have not demonstrated, as a matter of fact, that they are outside the reach of a legitimate or compelling state interest (i.e., unsafe sex). [See Petitioner's Statement of the Case].

It is odd that Petitioners would be so willing to overlook the fact that there are, obviously, conceivable instances where the Constitution rightfully provides the States with the power to assert moral authority to protect and regulate citizens. It is sad that Petitioners advocate a position that does not entail the least responsibility to enact and enforce any laws that prevent any potential "Carlos" from infecting himself, or others, with a deadly and financially costly disease. While one could concede that the desire to be a homosexual is not necessarily a proven "disease" [Pet. Brief p. 16], living the lifestyle of a homosexual can be, and often is, a cause of disease.

To the extent that *Bowers v. Hardwick*, 478 U.S. 186 (1986) provides the States with the power to care for their citizens, it must not be overruled. Indeed, it would be immoral for this Court to disregard the faces of a Nation suffering from the scourge of HIV/AIDS, human papilloma virus, and other devastating diseases in the interest of sanctifying sodomy as a jewel in the crown of Constitutional liberty. Sexual freedom is not more important than preventing unnecessary human suffering. However, Petitioners do not so allow mere mention of even one possible exception to the rule of sexual liberality they militantly propose. Neither 'con-sensuality,' nor privacy, are justifications for stripping the States of their Tenth Amendment rights.

Amici Curiae implore this Court to issue an opinion which recognizes that not all "consensual" sex between adults is immune from state regulation. As with pornography, obscenity, adult business regulation, prostitution, marriage, child-raising, and a host of other essentially private behaviors, the States have a legitimate right to regulate socially harmful behavior. This Court has an established history of recognizing that even private and consensual intimacy, between adults, can have consequences open to regulation.

While the State of Texas has been shockingly impotent in its attempts to extend compassion and responsibility toward the consequences of dangerous behaviors, this Court should

not shirk its responsibility to interpret the Constitution in a manner that recognizes that 'tough love' has a place in the ordinary regulation of even 'private' citizen behavior. Even AIDS activists at the University of California San Francisco seem to recognize the importance of bringing an effective end to conduct "that's capable of transmitting HIV . . .". http://hivinsite.ucsf.edu/InSite.jsp?doc=2098.418e.

In assessing obligations to the Constitution, it does not matter that Petitioners have the strongest of desires, whether genetic or intentional, to place each other at the risk of contracting deadly diseases, in the Petitioners' ill-defined interest in 'privacy.' There is no authority that suggests that this Court is required to give a positive affirmation of every single facet of individual sexuality. Whether or not the etiology of homosexuality is genetic or social, homosexuals do have the freewill to avoid dangerous behavior, and the States have a legitimate interest in preventing the healthcare costs, social costs, and psychological costs of deadly behaviors, including consensual anal sex by and between heterosexual or homosexual adults. If this Court gives all members of the homosexual or heterosexual communities sexual carte blanche, it deprives them of the opportunity and obligation to be responsible to the individual States for irresponsible conduct. This should not be the intended course of a morally responsible Court.

While Petitioners strenuously compare themselves to the loving heterosexual families who have existed over the course of human history, this same history bears out the indisputable truth that monogamous marital/conjugal relationships do not ordinarily result in the transmission and spread of deadly diseases and other economically costly effects. One can readily see that there are members of the class of homosexuals who simply do not care about what they might do to each other, and whether or not the consequences of their behavior may give rise to the spread of disease and soaring healthcare costs. Indeed, the flippant attitude of certain

members of Petitioners' class is demonstrated by comments such as, "Our guys f–k and s-k without any barriers, lectures or bulls—t. [exact words edited]." See, http://www.bareback.com. There is no Constitutional right, whether framed by our Founding Fathers, or by this Court in the year 2003, to "f–k and s–k without any barriers." The record below does not distinguish Petitioners from those who act without "barriers," and Petitioners do not care that there is no reasonable claim that the Fourteenth Amendment provides free license for consensual sex of this nature.

As one can see from the *Rolling Stone* article and www.bareback.com, certain members of Petitioners' class (i.e., homosexuals) proudly demonstrate their unwillingness to acknowledge society's desire to be compassionate, and to preserve precious healthcare resources for those who have fallen, not because of preventable and irresponsible conduct, but because of the genetic conditions that cause heart disease, malignant cancers, Parkinson's disease, Lou Gehrig's disease, and so many other debilitating conditions. It seems impossible that any honest assessment of the United States Constitution could net a result that commands that privacy and sexual liberation be deemed premier interests which outweigh even the cries of America's terminally ill.

While Petitioners may deny, without an adequate appellate record, that they personally engage in completely irresponsible behaviors themselves[2], they must admit to the fact that members of the class of persons, known as 'homosexuals,' do have members that define themselves by their

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[2] The paucity of the record below does not disclose even basic facts such as whether Petitioners were in a continuing homosexual relationship, whether they were acting in a manner that invoked the State of Texas' legitimate police powers, or whether they actually qualified as members of the class of "homosexuals." All that is known is that they were caught in the act of certain conduct in a limited instance of time.

willingness to engage in *conduct*[3] that can kill. On the other hand, this Honorable Court has a moral obligation to bring the full force of the Constitution, and the responsible exercised power of the individual States, down upon dangerous conduct. Petitioners' position commands that this Court run from its apodeictic obligations.

On the other hand, as shown below, the conduct and proposed rights of Petitioners bear out unacceptable consequences to individuals, and society as a whole. While it may be very true that not all conduct of the Petitioners nets deleterious effects, certain of their admitted behaviors do pose notable risks to society. These risks need to be prevented. Such risks will not be prevented if this Court crafts a decision of the unfettered scope suggested by Petitioners and the army of *amici curiae* that have followed in their quest for unfettered sexual liberation in the face of mortal consequences and inequitable socio-economic costs.

Where individuals cannot control their own dangerous behaviors, the State must be able to respond accordingly. The greater public health consequences of same-sex sodomy provide a rational basis for discrimination against such conduct. *Bowers v. Hardwick* is good and necessary law to preserve the right of states to regulate socially irresponsible conduct.

This Court can be assured that any irresponsible decision, on its part, will be metastatic. Petitioners will not be content with only having gained the judicially-created right to engage in sodomy, they will seek same-sex marriage, affirmative action, and a host of other societal covenants that are not ordinarily occasioned by one's claimed genetic/adaptive

[3] *Amici Curiae* are not arguing that the State has legitimate interests in regulating a person's thoughts, temptations, moral beliefs about sexuality, or mere tendency to engage in irresponsible acts. Creating an environment where the States can regulate harmful conduct is the Constitutional promise sought to be obliged here.

inability to control sexual urges toward members of their own sex, or an inability to be socially responsible for the danger of placing one's reproductive organs in the anus of another human being.

I. PETITIONERS' EQUAL PROTECTION ARGUMENT IS FAULTY

Petitioners claim that Texas law is unlawfully discriminatory against homosexuals as a classification of persons. This position is not legally sound and should be rejected. To wit, Petitioners are claiming that homosexuals are unlawfully treated differently than 'traditional' couples under the law. This could be a completely true statement and there is no constitutional offense. Persons can be treated differently according to the conduct that they *choose* to engage in. If any person desiring to engage in sodomy can be said to have control over such an urge, then it is not unreasonable to hold them to account for the potential consequences of such behavior. If they claim the urge to be uncontrollable, society's interest in regulation is all the more accentuated. It hardly makes sense to await the development of critical mass in terms of a person contracting a deadly disease, spreading the disease, and the healthcare costs associated therewith.

In any event, the core purpose of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993). It was not intended "to interfere with the power of the state . . . to prescribe regulations to promote the health, peace, morals, education, and good order of the people." *Barbier v. Connolly,* 113 U.S. 27, 3 (1884). In fact, it has been recognized that a State can rarely legislate without discriminating against one group or another. *Sullivan v. U.I.L.,* 616 S.W.2d 170, 172 (Tex. 1981).

By definition, the prohibition of one form of conduct, over another, results in discrimination against those who may or may not partake of the conduct so legislated. Prostitutes,

pedophiles, pederasts, purveyors of obscenity, irresponsible heterosexuals, and irresponsible homosexuals all deserve to be held to account for foolish behavior. Here, the record does not disclose whether Petitioners are responsible. The record does not disclose whether the State of Texas had a legitimate right to interfere with the conduct of the Petitioners. Unfortunately, the State of Texas has been forced to defend what may be a good law in the face of a questionable record. As pointed out in the Brief of the Institute for Justice, at pp. 26-28, it is impossible to analyze whether or not the Texas statute is rationally related to its goals.

This is because one cannot tell from the record below, whether or not Petitioners were engaged in behavior beyond the reach of the government, as opposed to conduct such as "bug chasing," which would be sanctionable. This Court has been placed in the tenuous position of having to consider a decision, that may have broad societal impact, with no sense of whether the parties even meet the epistemic challenge of rising to the call of the stated principles they expect to be sanctified by this Court. Whether Texas has a legitimate state interest can only be determined in a well-defined context. Such definition is clearly lacking in this case. *See Romer v. Evans*, 517 U.S. 620, 631 (1996) [regarding the judicial need to be able to draw connections between facts and law].

In order to complain of the unconstitutionality of a statute, one must show that one is a member of a class discriminated against by the statute. *See Tileston v. Ullman*, 318 U.S. 44 (1943); *Gladstone, Realtors v. Bellwood*, 441 U.S. 91 (1979). Here, the record discloses only a single instance of homosexual conduct occasioned by State prosecution. If it is that Messrs. Lawrence and Gardener were merely experimenting with their sexuality, one would be loathe to necessarily identify them as homosexuals per se'. If it is that the conduct of Petitioners defines their constitutional status, then Section 21.06's criminal applicability is not contingent on

one's sexual identity, and only addresses what may be dangerous conduct.

Giving every benefit of the doubt to Petitioners, the Court has, at no time, recognized homosexuals or other participants in sexually-defined conduct as protected classes for Equal Protection purposes. In *Board of Education of Oklahoma City v. National Gay Task Force*, 729 F.2d 1270, 1273, aff'd. 470 U.S. 903 (1985), the court affirmed the ruling of the 10th Circuit Court on this point, saying "We cannot find that a classification based upon the choice of sexual partners is suspect." It has also addressed the issue in the negative by denying review of lower decisions finding no such protection. *See, Rowland v. Mad River Local School District,* 730 F.2d 444 (6th Cir. 1984), rehearing denied 470 U.S. 1009 (1985). A denial of review is no less appropriate in this case. There is no confusion in the laws as suggested by Petitioners. (Petitioners' Brief at p. 9).

Petitioners are attempting to force this country to condone homosexual relationships and to create a universal right, based on these relationships, which has never been recognized in the Constitutional history of the United States. See, *Jantz v. Muci,* 976 F.2d 623 at 624 (10th Cir. 1992), *cert. den.*, 508 U.S. 952 (1993) (re discrimination against job applicants and declaring no precedent to support protected class).

As noted in Justice Burger's concurring opinion in *Bowers v. Hardwick, supra.*, "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization [cites] . . . This is essentially not a question of personal "preferences" but rather of the legislative authority of the State." *Id.* at 196, 197.

II. HOMOSEXUALS ARE NOT A DISADVANTAGED CLASS FOR PURPOSES OF EQUAL PROTECTION ANALYSIS

Petitioners and their supporters argue that many lesbians, gays, and bisexuals have suffered longstanding social and economic discrimination. These groups of persons are portrayed as disadvantaged groups.

The portrayals by Petitioners are misleading and contrary to established law. In real terms, "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no recognizable roots in the language or design of the Constitution." *Bowers* at 478 U.S. 195. Here, as shown in the Introduction, above, this Court is now being asked to recognize, and align itself, with a class of persons who are defined by their tendency or willingness to engage in certain behaviors, including sodomy. Within that same class are persons who wantonly act towards spreading and receiving AIDS. This Court's acceptance of a sexual 'free-for-all,' veiled in an emotional appeal to some 'loving relationships,' is not going to assist it in maintaining the legitimacy acknowledged by Justice White in *Bowers*, a decision that was joined by Justices Burger, Powell, Rehnquist, and O'Connor, less than twenty years ago.

To establish a suspect/disadvantaged class, for purposes of the law, it must be shown that the plaintiff is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from majoritarian political process." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 28 (1973). Moreover, the "immutability" of the plaintiff's characteristics is a factor to be considered. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

This Honorable Court has only recognized five separate classes as qualifying for strict scrutiny review in the face of discriminatory actions by a state. Homosexuality is not one

of these classes. Indeed, "The Supreme Court, however, has never held that homosexuals are a suspect class. Likewise, lower courts have also refused to classify homosexuals as a suspect class. Therefore, courts have not used a suspect class analysis to apply strict scrutiny to procedural burdens on homosexual rights legislation." Seth Hilton, *Restraints on Homosexual Rights Legislation: Is There a Fundamental Right to Participate in the Political Process?* 28 U.C. DAVIS L. REV. 445, 453 (1995).

In fact, "The Supreme Court has identified several factors for determining whether a particular class of people constitute a suspect class. Class members must have an immutable characteristic, be politically powerless, and have suffered from a history of discrimination. Homosexuality usually fails this test by failing to establish an immutable characteristic. When analyzing immutability, most have considered homosexuality strictly an issue of conduct that does not involve any irrepressible internal identification and understandings of self. In addition to the inability to clear the immutability hurdle, homosexuals have also experienced difficulty satisfying the politically powerless prong of the suspect class test. As a result of these problems, the Supreme Court has refused to declare homosexuals a suspect class." Gary Alan Colis, *Romer v. Evans: Gay Americans Find Shelter After Stormy Legal Odyssey*, 24 PEPP. . . REV. 991, 995 (1997) [citing Hilton, *Id.*]. *See also, Gay Inmates of Shelby County Jail v. Barksdale*, No. 84-5666 (6th Cir. June 1, 1987); *Dronenburg v. Zech*, 741 F.2d 1388, 1391 (D.C. Cir. 1984); *State v. Walsh*, 713 S.W.2d 508, 511, 55 USLW 2070 (Mo. 1986); *In re Opinion of the Justices*, 129 N.H. 290, 295, 530 A.2d 21, 24 (1987); *Gay and Lesbian Students Ass'n v. Gohn*, 656 F.Supp. 1045, 1057 (W.D. Ark. 1987).

In applying the above critical analyses, the recognized "suspect" classes are: "Race," *Loving v. Virginia*, 388 U.S. 1, 11, 875 (1967), "Alienage," *Graham v. Richardson*, 403 U.S. 365, 372 (1971), and, "National Origin," *Korematsu v.*

United States, 323 U.S. 214, 216, 65 S.Ct. 193 (1944). The recognized quasi-suspect classes are: "Gender," *Frontiero, supra*, *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-724 (1982), and, "Illegitimate Children," *Lalli v. Lalli*, 439 U.S. 259, 265 (1978).[4] There is a general policy against extending the protections of a 'suspect class status' to other groups. *Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir.), *cert. denied*, 117 S. Ct. 358 (1996); *High Tech Gays*, 895 F.2d at 571-72 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989), *cert. denied*, 494 U. S. 1004 (1990); *Padula v. Webster*, 822 F.2d 97, 103-04 (D.C. Cir. 1987); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc), *cert. denied*, 478 U. S. 1035 (1986).

There is a remarkable factual consistency in the above classes. Each recognized class possesses characteristics that are indeed "immutable," or virtually permanent. Simply, a person does not need to "come out of the closet" to have it known that he or she is a member of some suspect class. A mere inquiry into the person's birth circumstances reveals the person's membership status. Being a member of any one of these classes does not expose one to diseases, a shortened life span per se,' or any of the other conditions that accompany the decision to 'live out' one's homosexuality. *See, Sodomy: A Public Health Risk*, Family Policy Network, http://www.familypolicy.net/policy/sodomy-consequences. shtml. *See also*, The Washington Times, http://dynamic.washtimes.com/twt-print.cfm?ArticleID=20030212.

An additional consideration for the court is the potential for abuse that exists in the creation of a suspect class which cannot be determined by objective criteria. For example, if homosexuality or "sexual orientation" were to become equivalent to race in hiring or admissions policies, non-homosexual persons could, with impunity, claim to be homosexual to

[4] See also, http://www.family.org/cforum/research/papers/a0002964.html

qualify for more favorable treatment. This consequence is especially likely in, but not exclusive to, organizations such as schools and colleges that are increasingly concerned with reflecting "diversity" in their populations. This makes a mockery of the legitimate civil rights movement.

Further abuse is likely if homosexual activists discover that they can gain greater political power for their movement by stacking a diversity-minded organization with "in-the-closet" members in addition to the "out-of-the-closet" ones. Conceivably, the population of an organization could be made up entirely of homosexuals with only 2-3% being out of the closet. The organization would thus appear to reflect the percentage of homosexuals in the general public, yet be entirely in the political control of "gay" activists. Obviously this special capability of homosexuals would disadvantage racial and other minorities whose defining characteristics are easily observable.

Leading strategists of the homosexual political movement have acknowledged that homosexuality is not immutable. The following is quoted from *The Advocate*, the magazine-of-record of the homosexual movement.

"There is this dichotomization problem," concurs Pat Cain, a professor of law at the University of Iowa Law School who serves on the board of directors of Lambda Legal Defense and Education Fund, a gay group. "You're male or you're female, you're black or you're white, you're gay or you're straight—and of course we know that's not true". . . ."There are a lot of lesbians coming out of the women's movement who are into freedom of choice and have experienced their own decision to become a lesbian as a free choice and as one they continue to affirm: 'I am proud to be a lesbian, I choose it, I affirm it, and you don't have to feel sorry for me—I wasn't born this way.'" *See* Masha Gessen and David McGowan, *Raiders of the Gay Gene*, THE ADVOCATE, (March 24, 1992).

Dutch homosexual researcher Herman Meijer, in a paper published in the *Journal of Homosexuality* asked the scientific question, "Can Seduction Make Straight Men Gay?."

"Can a man whose past sexual practice has been almost exclusively heterosexual change his practice to homosexual after being seduced by another man? To those who believe that homosexual preference is homosexual *orientation*, an innate biological predisposition, the answer is a resounding 'no.' Contrary to this response, the author presents three cases in which the men switched from heterosexual to homosexual relationships (exclusively in two cases) by means of a sexual encounter initiated by another man. . . . The evidence that these men experienced a genuine change in sexual preference, shows that life-long, exclusive homosexuality, as articulated by gay rhetoric, is more a statement about the culture in which it occurs than the 'essence' of homosexuality." [Emphasis in original] [from John P. De Cecco, John P. Elia, *If You Seduce a Straight Person, Can You Make Them Gay?*, Issues in Biological Essentialism Versus Social Constructionism in Gay and Lesbian Identities, originally published as *Journal of Homosexuality*, Hayworth Press, Volume 24, Number 3/4 (1993)].

Award-winning "gay" author Lillian Faderman admits that the claim of immutability is made in bad faith by homosexual activists. "The concept of gay and lesbian identity may be nothing but a societal construct, but it has been crucial, enabling us to become a political movement and demand the rights that are due us as a minority. What becomes of our political movement if we openly acknowledge that sexuality is flexible and fluid, that *gay and lesbian* does not signify 'a people' but rather a 'sometime behavior'?" [Emphasis in original] [*See*, Lillian Fademan, *A Bisexual Moment*, THE ADVOCATE (September 5, 1993)].

One's race, national origin, sex, alienage, and illegitimate status are all based on biological, or identifiable geographical factors, beyond the control of the class member. Once the

member has taken on one of these statuses through birth, the status cannot be changed. However, the only way that one can be identified as a homosexual is through voluntary verbal or physical conduct which alerts another person of the sexual status. Simply, a homosexual must somehow, fail to keep his or her status, or relationships flowing therefrom, private. They must breach their own "right of privacy."

While Petitioners argue that the ban on same-sex sodomy is a form of gender discrimination, this argument has been expressly rejected time and again. The laws against gender discrimination arise exclusively out of the fact that women were treated as being inferior to men. The oppression caused by this 'labeling' gave rise to a need to enact protective laws. *Reed v. Reed* 404 U.S. 71 (1971); *Phillips v. Marietta Corp.* 400 U.S. 542 (1971). As demonstrated below, Petitioners' position does heavy damage to the progress made by women and racial minorities during the historical development of this Nation.

Finally, as to whether homosexuals are "politically powerless," the Ninth Circuit Court in *High Tech Gays* correctly pronounced that "homosexuals are not without political power, they have the ability to and do 'attract the attention of lawmakers'." *Supra* at 895 F.2d at 574.

III. REGULATING SAME-SEX AND OPPOSITE-SEX CONDUCT DIFFERENTLY IS PERMISSIBLE DUE TO GREATER PUBLIC HEALTH RISK OF SAME-SEX CONDUCT

Petitioners assert that "As a matter of equal protection, bare condemnation of one group of people—whether termed a moral judgment, a value judgement, or simple dislike—cannot sustain a classification like the Homosexual Conduct Law under any level of scrutiny." [Petition for Review at p. 9].

The law in question can be justified without the least reliance on religious morality or social prejudice against self-identified homosexuals. What is condemned by the law is not

a "group of people" but volitional same-sex sodomy by individuals. Public health records identify such conduct as disproportionally costly to society as opposed to sodomy committed by opposite-sex partners. This is not to suggest that opposite-sex sodomy does not harm the public health, but the type and degree of harm are different enough that criminalizing one and not the other does not violate the very lenient standards for classifications set by the court. The standards have been summarized as follows:

> "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. [354 U.S. 457, 464]. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Morey v. Doud*, 354 U.S. 457 (1957), citing *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911).

In *Romer v Evans,* 517 U.S. 620, 631 (1996), the court ruled that "If a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."

A legitimate end not addressed by the majority in the Court of Appeals is the state's interest in public health, as distinct

from public morals. The states' legitimate interest in the public health has been repeatedly affirmed by this court.

> "It has been often said that the police power was not by the Federal Constitution transferred to the nation, but was reserved to the states, and that upon them rests the duty of so exercising it as to protect the public health and morals. While, of course, that power cannot be exercised by the states in any way to infringe upon the powers expressly granted to Congress, yet until there is some invasion of congressional power or of private rights secured by the Constitution of the United States, the action of the states in this respect is beyond question in the courts of the nation." *L'Hote v. New Orleans,* 177 U.S. 587 (1900). See also *Barbier v. Connolly, supra* at 31.

Indeed, the state's interest in public health is deemed so compelling that this court has ruled that a viable unborn child may be killed to preserve the health of a mother at her option, *Roe v. Wade,* 410 U.S. 113, 164-165 (1973), even at the point of birth, *Stenberg v Carhart,* (99-830) affirming 192 F.3d 1142 (2000). Relative to the instant circumstances, studies indicate a significantly greater threat to public health from same-sex than from opposite-sex relationships, especially regarding AIDS. According to the most recent statistics complied by the Centers for Disease Control, same-sex relationships account for 361,867 of the 793,026 total cases of AIDS reported in the United States as of June, 2001, while homosexual intravenous drug users accounted for another 50,066 cases. This is compared to 85,738 cases caused by opposite-sex relations.[5] An alarming recent increase in drug resistance to AIDS, or AIDS "super-infection," is also highest among homosexuals.[6] The magni-

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[5] CDC website http://www.cdc.gov/hiv/stats.htm#exposure

[6] *Antiretroviral-Drug Resistance among Patients Recently Infected with HIV*, New England Journal of Medicine, Volume 347:385-394, August 8, 2002. Susan J. Little, M.D., Sarah Holte, Ph.D., Jean-Pierre

tude of the disparity between same-sex and opposite-sex conduct cannot be overlooked. According to the widely respected 1994 University of Chicago study "Sex in America: A Definitive Survey," only 5% of men and 4% of women have engaged in same-sex conduct at any time in their lives, with just 2.8% of men and 1.5% of women choosing homosexual relations exclusively.[7] There is thus a dramatically disproportionate public health risk associated with same-sex conduct as opposed to opposite-sex conduct.

Oxford University's *International Journal of Epidemiology* reported a dramatic impact on the average age of mortality for those involved in same-sex relationships.

> "In a major Canadian centre, life expectancy at age 20 years for gay and bisexual men is 8 to 20 years less than for all men. If the same pattern of mortality were to continue, we estimate that nearly half of gay and bisexual men currently aged 20 would not reach their 65th birthday. Under even the most liberal assumptions, gay and bisexual men in this urban centre are now

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Routy, M.D., Eric S. Daar, M.D., Marty Markowitz, M.D., Ann C. Collier, M.D., Richard A. Koup, M.D., John W. Mellors, M.D., Elizabeth Connick, M.D., Brian Conway, M.D., Michael Kilby, M.D., Lei Wang, Ph.D., Jeannette M. Whitcomb, Ph.D., Nicholas S. Hellmann, M.D., and Douglas D. Richman, M.D.

[7] R. Michael, J. Gagnon, E. Laumann, *Sex in America: A Definitive Survey* (Boston: Little, Brown and Company, 1994), pp. 175-177; Tom W. Smith, "*American Sexual Behavior: Trends, Socio-Demographic Differences, and Risk Behavior,*" National Opinion Research Center, GSS Topical Report No. 25, December 1998, p. 50. See also Dawson, D. A., "*AIDS Knowledge and Attitudes,*" [various dates] Advance Data, *National Center for Health Statistics:* DHHS Pub. No. (PHS) 88-1_250, nos. 160, 161, 163, 176, 183, 193 reporting on a Federal government study considered to be the largest continuing survey of homosexual activity ever conducted, reaching 119,347 randomly selected adults by March of 1991. This study revealed that only 3% of males had reported any homosexual activity since 1977.

> experiencing a life expectancy similar to that experienced by all men in Canada in the year 1871."[8]

AIDS is not the only disease disproportionally affecting same-sex partners. Unlike AIDS, these diseases are prevalent in female same-sex relationships as well. The Medical Institute for Sexual Health reported that "Homosexual men are at significantly increased risk of HIV/AIDS, hepatitis, anal cancer, gonorrhea and gastrointestinal infections as a result of their sexual practices. Women who have had sex with women are at significantly increased risk of bacterial vaginosis, breast cancer and ovarian cancer than are heterosexual women."[9]

Neither are same-sex health risks limited to physical problems but include mental health problems as well. In 2001, the Journal of the American Medical Association reported that:

Compared to other men, males who engage in same-sex conduct are:

> 727 percent more likely to have suffered bipolar disorders at some point in their lives, and 502 percent more likely in the last twelve months.
>
> 718 percent more likely to have suffered obsessive-compulsive disorder in the last twelve months, and 620 percent more likely at some point in their lives.
>
> 632 percent more likely to have suffered agoraphobia (fear of leaving home or being in public) in the last twelve months, and 454 percent more likely at some point in their lives.

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[8] Hogg, R.S., *et al.*, *Modeling the Impact of HIV Disease on Mortality in Gay and Bisexual Men*, International Journal of Epidemiology, Vol. 26, 657-661, 1997.

[9] Medical Institute for Sexual Health, "*Executive Summary: Health Implications Associated with Homosexuality,*" 1999.

421 percent more likely to have suffered panic disorder, and 229 percent more likely to have suffered social phobia at some point in their lives.

375 percent more likely to have suffered simple phobia in the last twelve months, and 361 percent more likely at some point in their lives.

311 percent more likely to have suffered mood disorders at some point in their lives, and 293 percent more likely in the last twelve months.

261 percent more likely to have suffered anxiety disorders in the last twelve months, and 267 percent more likely over the course of their lifetimes.

270 percent more likely to have suffered two or more psychiatric disorders during their lifetime.

235 percent more likely to have suffered major depression at some point in their lives.

Compared to other women, females who engage in same-sex conduct are:

405 percent more likely to have suffered a substance use disorder.

241 percent more likely to have suffered mood disorders during their lifetimes.

209 percent more likely to have suffered two or more mental disorders during their lifetimes.[10]

While it cannot be stated conclusively that increased incidents of mental health and other disorders among persons involved in same-sex relationships are directly related to the practice of sodomy, such a conclusion by a state is legally permissible. It is well established that a state has broad

[10] Sandfort, Theo G.M, *et. al.*, *"Same-Sex Sexual Behavior and Psychiatric Disorders,"* Archives of General Psychiatry (Journal of the American Medical Association), Vol. 58, No. 1, (2001), cited in "*The Legal Liability Associated with Homosexuality Education in Public Schools*," Citizens for Community Values, Cincinnati, Ohio (2002).

latitude to interpret empirical data as to the secondary effects of regulated conduct. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 4, 106 S.Ct. 925 (1986), *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628 (1973).

Thus, it is no constitutional violation for the State of Texas to discriminate against same-sex sodomy.

IV. RECENT SOCIAL TRENDS ARE NOT A SUFFICIENT BASIS FOR OVERRULING *BOWERS V. HARDWICK*

Petitioners argue that *Bowers v. Hardwick* should be overturned on the grounds that "legal and social developments have undercut its reasoning and its ultimate determination that the right to privacy does not shelter the deeply personal realm of consensual, adult sexual intimacy in the home." [Petition for Review at p. 9].

While it is true that several states have repealed their sodomy laws in the years since Bowers, this fact does not justify interference with the remainder of states which have retained such laws. This court only recently affirmed its "established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy." *Smith v. Robbins,* 528 U.S. 259 (2000) and has recognized that "states possess primary authority for defining and enforcing criminal law" *U.S. v Lopez,* 514 U.S. 549 (1995). Texas would have the right to criminalize sodomy even if it were the only state to do so.

Petitioners' appeal to emotionalism, which makes up the bulk of their complaint, is equally unavailing. Euphemistic characterizations of anal sodomy as "loving behavior" [Petition for Review at p.8] and "nurturing . . . intimacy "[p.13] cannot mask the harmful nature of such conduct. Neither can such an appeal substitute for sound logic. To the extent that Petitioners implicitly suggest that their behavior is 'genetic'

or 'involuntary,' they deny their own freewill and responsibility for dangerous behavior with secondary effects. Mere sexual desire, no matter how compelling, cannot justify sexual behavior. Plainly, it is the social consequences of the behavior in question, not the "sexual orientation" of the participants, that makes sodomy properly subject to criminal sanction in the public interest.

Petitioners' disregard for social consequences, however, extends beyond their own conduct. In one blow, Petitioners would virtually eliminate the ability of states to protect their citizens from destructive sexual behavior, for, as stated in *Bowers*: if the basis for finding a right to privacy for homosexual conduct is "voluntary sexual conduct between consenting adults, it would be difficult, except by fiat...to limit . . . adultery, incest and other sexual crimes" *Bowers v. Hardwick*, *supra* at 195-196. Moreover, Petitioners' attacks against the states' ability to regulate morality are stymied by the reality that the states' powers over moral issues have been upheld time and again. *Berman v. Parker*, 348 U.S. 26 (1954); *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220 (1949); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Bowers v. Hardwick, supra*.

V. PETITIONERS' DESIRE TO HAVE A CONDUCT-BASED STATUS RECOGNIZED AS A PROTECTED CONSTITUTIONAL STATUS DEFIES CONSTITUTIONAL COMMON SENSE

The sanctity of one's humanity is not realized through a desire to sodomize, or to be sodomized by, another human being. Our humanity, individual successes, and their intrinsic Constitutional value derive from the fact that one is given the opportunity to participate in a society that justly holds one to account for socially damaging behavior. A certain dignity is bestowed upon each of us in the comforting recognition that we can be protected from the irresponsible behavior of others. The desire to be responsible for bad decisions and conduct,

and the desire to be protected from others' irresponsibility, seem to be basic human characteristics. While the Constitution may indeed protect segregated instances of irresponsible behavior, it certainly cannot be expected to dignify patterns of dangerous behavior, and a millennial history of human discernment that weighs against supporting sodomy.

Human dignity, of the kind implicit in the Ninth and Fourteenth Amendments, does not come from a revolt against basic human characteristics as suggested by Petitioners. Frankly, the desire to place one's reproductive organs in the anus of another human being does not seem to be a natural and inherent human characteristic. The desire to avoid dangerous behavior, and to hold the self to account before society's command for responsible behavior, in public, and in private, seems to be more implicit to a concept of ordered liberty. It seems self-evident that the Constitution bears evidence to a higher purpose in the governance of human affairs.[11] Any reasonably determined purpose of the Constitution hardly seems in alignment with a claimed right to sodomy.

Denials of responsibility to society, even in private sexual affairs, are not implicit in the concept of ordered liberty, nor are they reflective of the deep and rich history of this Nation. The Founders of our Nation, including William Penn, Abigail Adams, James Madison, and the others, seemingly adopted the position that citizens are to accept the lot given to them and that no man can prevent us from fulfilling our destiny within the confines of responsible Government and conscientious private conduct.

Contrary to the position of the Petitioners, liberty of the mind and body comes directly from the acceptance of that which one does not choose, even if it is an alleged genetic

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[11] Richard D. Ackerman, *The State of America's Constitution*, The Western World, (Pearson Custom Publishing, Boston, MA 2002) pp. 80-85.

disposition toward homosexual behaviors. Liberty can be found in the acknowledgment that these things matter not to the inherent dignity associated with being able to voluntarily rise to the call of responsible behavior. It seems that rising above one's genetic conditions, and successfully assimilating into a culture that promotes and demands responsible conduct, is the hallmark of dignified humanity.

Indeed, Constitutional freedom is not found in forcing a Nation to place sodomy on par with the First Amendment, or to force other individual citizens to accept personal revolts against reasonable requirements of the States under the Tenth Amendment. Being thrust, by birth, into a culture not of one's own making is not a crutch, but a rich and robust collage of opportunity that came before each citizen, and which constitutes the fundamental building blocks necessary to the fulfillment of who each person is as a citizen of this great Nation.

The homosexual agenda promoted by Petitioners, and their counsel, completely defies common sense, human dignity, and public policy. This agenda espouses, among others, several notions:

A.) People are automatically victimized by the mere fact that they were socially or genetically created in a certain way;

B.) There is a constitutional right to engage in anal sex;

C.) Recognition of the aforementioned 'right' to engage in anal sex is necessary to self-fulfillment in a Nation governed by the United States Constitution.

First, in order for a constitutional right to exist, one must show that the proposed 'right' is implicit to the concept of ordered liberty. It must also be shown that exercise of that right is something that is deeply rooted in the annals of our history. In essence, it must be shown that the deprivation of such a right would destroy the very foundations of our Nation. *See generally, Moore v. East Cleveland, Ohio*, 431 U.S. 494 (1977). Moreover any asserted fundamental liberty

interest must be specifically described. *Reno v. Flores*, 507 U.S. 292 (1993). A subjective desire/tendency to engage in anal sex hardly rises to the occasion of these legal requirements. At most, these are moral issues that, according to volumes of case law and the millennia of human history, are better left to the Will of the People through their legislatures. In fact, it is rather curious that Petitioners, and their militia of *amici*, have not even attempted to define exactly what they mean by a 'homosexual person.' Yet, they wish to have this Court create a suspect class of persons beyond the reach of the State of Texas or even the United States government. The shanty record in this case is rife with the possibility of creating an ever-changing standard of what it might mean to be in or out of the class of persons defined as 'homosexual.'

Secondly, those who promote the homosexual propaganda refuse to acknowledge that sodomite homosexualism is a matter of choice. If one can be a celibate homosexual, the behavioral nature of sodomy is self-evident and indisputable. If it is claimed that one cannot control the urge to sodomize, the need for intensified governmental regulation seems to be bolstered. Nevertheless, it is argued by the homosexual community that its members did not choose to be born a certain way. Rather, it is claimed that they must revolt against a biological identity imposed upon them simply by virtue of their human existence. This claim admits of the fact that the only way one can be self-identified or labeled as "homosexual," is by a conscious decision to 'out themselves' in the public fora. A "revolt," by its very nature, is a choice. Oddly, homosexuals claim that this 'outing' process is necessary to their success as a class of persons under the Constitution. Nothing could be further from the truth.

Some things are better left unsaid and undone, and responsible citizens cannot expect that every expression thrown into the marketplace of ideas and acceptable conduct will be purchased wholesale by the public. Moreover, it is well established by law that the state has a legitimate right to

regulate conduct, considered by the majority to be abhorrent. This Court has acknowledged that the State need not resolve every empirical difficulty that surrounds any given piece of legislation. *Renton, supra.* In other words, even if one grants that homosexuality is not understood scientifically, this does not mean that the state must give up its right to regulate homosexual related behavior before and after the scientific explanations are provided.

It is suggested by Petitioners that this Nation must accommodate all private anal sex, between adults, and other expressions of a person's sexual identity. Petitioners have not provided an appellate record that would suggest otherwise. Even so, the individual States have a right to maintain a stable social environment, untainted by deadly diseases, and the conduct that causes them. The introduction of subjective standards as to the standards for Constitutional recognition of sexual preferences are hardly conducive to maintaining these necessary goals.

Finally it is wrong for Petitioners to compare homosexual persons with minorities and women for purposes of Equal Protection, and the noble remediation of past discrimination. In fact, the advocacy of homosexuality, as a gender-based identity, destroys the very foundations of the 1964 Civil Rights Act. Were one to accept homosexual persons as a "suspect class," for purposes of discrimination laws under the Equal Protection Clause, one would only degrade the hard work and years of effort directed toward achieving racial and sexual equality in the workplace and in education.

Incredibly, the proponents of Petitioners' position argue, at a whim, a homosexual male can simply associate himself with the status of being born female or being born as a racial or ethnic minority. [NOW Brief at p. 1]. If this Court accepts that the mere tendency to engage in sodomy is a protected Constitutional status, being a woman or a racial minority becomes meaningless. If anything devalues a woman [NOW

Brief at p. 4], it is not the fact that people might be prevented from engaging in acts of sodomy. What is degrading is the notion that women have been put on par with those who do place their reproductive organs in the anus of another human being. Women and racial minorities deserve much more than that proposed by NOW.

Petitioners, and their supporters, are wrongfully convoluting the distinction between stereotypes and immutable characteristics. Stereotypes, and a Nation's creation of them, are matters of culture beyond the proper reach of this Court. If NOW, or Petitioners themselves, are in a battle over the morality of certain stereotypes [NOW Brief at p. 2], it certainly seems that this Court should not be the final judge of what culture means and how to control good or bad stereotypes about people and voluntary conduct by a limited number of persons. It is not this Court's job to determine whether or not homosexuality is consistent with 'sex roles' of men or women. *Bowers v. Hardwick, supra* at 195-196.

The American Bar Association's Brief certainly does little more to justify the destruction of the State's abi'ity to regulate certain conduct. While it may be very true that discrimination against homosexuals, in the workplace, or elsewhere, is wrong, it is not true that licentious, deadly behavior cannot be the subject of the power of the government. Anti-discrimination provisions, of the type mentioned by the ABA at pp. 7-13, have a just place in society because stereotypes can admittedly result in unfair discrimination, even on the *false belief* that someone is homosexual. Whether or not one is actually homosexual is irrelevant to the determination that employers, state bar associations, and others should not be inequitable in extending basic rights and privileges afforded to all. One cannot conceive of a situation whereby the American Bar Association, or any other business or government entity, would need to enable people to sodomize each other. Needing a job is different than 'needing' to be sodomized.

This Court can readily make the secular decision that certain types of conduct, regardless of who participates in such conduct, fall within the ambit of the Tenth Amendment. The Tenth Amendment rights of the States have not been declared dead as of yet. *See generally United States v. Darby*, 312 U.S. 100 (1941); *New York v. United States*, 505 U.S. 144 (1992)[regarding purpose of Tenth Amendment]. This Court should be no social engineer as suggested by NOW at pp. 16-17 of their Brief. *See Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986)[for proposition that policy choices and value judgments are not the purview of this Court]. NOW and other of Petitioners' *amici* fail to recognize that there is a difference between one's sexuality and what one does with that sexuality. This Court can uphold laws against discrimination and, at the same time, give full force and effect to the Tenth Amendment.

While one cannot undo their sex or race, one can choose not to engage in homosexual behavior. Again, if it is claimed that homosexual urges are beyond control, then the most dangerous of these behaviors is rightly subject to the power of the law. Moreover, if this Court accepts that anti-sodomy regulations can have a legitimate purpose in stifling the spread of disease, then such regulations relate only to irresponsible conduct. Those who engage in irresponsible conduct should not be deprived of the right to be responsible for their actions.

CONCLUSION

Petitioners have failed to state a valid Equal Protection or Due Process claim and have not shown a legal basis for overturning *Bowers*. Accordingly, the conviction of Petitioners by the State of Texas must be affirmed.

Respectfully Submitted:

RICHARD D. ACKERMAN *
GARY G. KREEP
UNITED STATES JUSTICE FOUNDATION
2029 East Valley Parkway, Suite 1-C
Escondido, California 92027
(760) 741-8086

* Counsel of Record

Counsel for Amicus Curiae